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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-

SELWYN A. ROBINSON, ELEANOR ROBINSON, RUSSELL S. ROBINSON, RUTH R. LEFIELL, MARION R. KEAT, JEAN R. WEIR, HELEN M. ROBINSON, KEITH P. ROBINSON and BRUCE B. ROBINSON, *Petitioners,*

v.

STATE OF HAWAII, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

Petitioners SELWYN A. ROBINSON, ELEANOR ROBINSON, RUSSELL S. ROBINSON, RUTH R. LEFIELL, MARION R. KEAT, JEAN R. WEIR, HELEN M. ROBINSON, KEITH P. ROBINSON and BRUCE B. ROBINSON, hereinafter referred to as "G&R,"[1] pray that a writ of certiorari

[1] Petitioners are tenants in common of the land and water rights involved and are referred to herein and below as "Gay & Robinson" or "G&R."

issue to review the judgment and opinions of the Supreme Court of Hawaii in the above cause on December 28, 1973.

APPENDICES

Petitioners have filed a Joint Appendix together with appellants-petitioners in *McBryde Sugar Company, Limited, et al.* v. *State of Hawaii,* No. 73- and petitioners in *Ida Albarado, et al.* v. *State of Hawaii,* No. 73- .

Appendix A relating solely to petitioners herein, and Appendix B, giving the text of Hawaiian statutes, are attached to this Petition.

OPINIONS BELOW

The opinion of the Supreme Court of Hawaii is reported at 54 Hawaii 174, 504 P. 2d 1330 (Joint Appendix 66). The opinion denying rehearing, dated December 20, 1973, is reported at 55 Hawaii 260, 517 P.2d 26 (Joint Appendix 114).

The decision of the trial court (Joint Appendix 1) is not reported.

JURISDICTION

The decision of the Supreme Court of Hawaii was filed January 10, 1973 (Joint Appendix 66). Timely petition for rehearing was filed on May 18, 1973 (Appendix A, *infra* pp. 26-29). An order (Record Doc. No. 55) extending time to petition for rehearing was filed January 15, 1973. An order (Joint Appendix 108) was filed June 18, 1973, permitting further briefing. The opinion denying rehearing (Joint Appendix 114) was filed December 20, 1973. The only judgment of the Supreme Court of Hawaii was entered on December 28, 1973 (Joint Appendix 159). The jurisdiction of this Court is invoked under 28 USC § 1257(3).

QUESTIONS PRESENTED

1. Did the decision of the Supreme Court of Hawaii that the State owns all water and that petitioners may transport no water out of the watershed fail to give the effect required by the Constitution [2] to the judgment in *Territory* v. *Gay*, 52 F.2d 356 (1931) that G&R owns the "normal surplus" water and may transport it out of the watershed?

2. Did the Supreme Court of Hawaii, by overruling its long line of undistinguishable decisions defining property rights in water on which petitioners had substantially relied, deprive petitioners of property without due process of law or just compensation?

3. Did the Supreme Court of Hawaii deprive petitioners of property without due process of law by deciding that the State owned property and that petitioners' claims to it were unsubstantiated, without giving petitioners any notice or opportunity to introduce evidence or argument to substantiate their claims which had been conceded by all parties throughout the proceedings?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution
Article I, Sec. 8:

> The Congress shall have Power . . . To make all Laws which shall be necessary and proper for

[2] Judicial power (Article III), Full Faith and Credit (Article IV), Necessary and Proper clause (Article I, Sec. 8), the Supremacy clause (Article VI) of the Constitution, and the Privileges and Immunities clause of the Fourteenth Amendment and the predecessor of 28 USC 1738, have been held by this Court to require state courts to give effect to federal judgments. All are invoked here by petitioners, who presented them to the court below.

carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

United States Constitution
Article III, Secs. 1 and 2:

Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies . . . .

United States Constitution
Article IV, Sec. 1:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

United States Constitution
Fifth Amendment:

No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution
Fourteenth Amendment, Sec. 1:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of . . . property, without due process of law; . . . .

28 USC § 1738:

. . . .

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, ...

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. (June 25, 1948, c. 646, 62 Stat. 947)

Hawaii Revised Statutes
§ 1-1:

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise . . . fixed by Hawaiian judicial precedent, or established by Hawaiian usage.

Hawaii Revised Statutes
§ 7-1:

Building materials, water, etc.; landlords' titles subject to tenants' use. Where the landlords have obtained, or may hereafter obtain allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted

in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use.

Section 7-1 is taken from Section 7 of the so-called "Act of Aug. 6, 1850," reprinted in 2 Revised Laws of Hawaii 1925, pp. 2141-2, reproduced Appendix B, *infra* p. 29.

Principles Adopted by the Board of Commissioners to Quiet Land Titles in Their Adjudication of Claims Presented to Them.

This report, usually called the "Land Commission Principles," was ratified by Legislative Council resolution on October 26, 1846. It is reprinted in 2 Revised Laws of Hawaii 1925, pp. 2124-2137, and pertinent portions in Appendix B, *infra* pp. 29-32).

STATEMENT OF THE CASE

This case involves water rights in Hanapepe Valley on the Island of Kauai. Petitioners (G&R) own two valleys (Koula and Manuahi) in the central mountains of Kauai. These valleys join to form Hanapepe Valley, which runs 4½ miles south to the sea. Hanapepe is owned by the State but McBryde Sugar Company, Limited (McBryde) has large holdings at the seaward end, and there are small holdings in Hanapepe.

Since 1891, petitioners (and their predecessors in title) have taken water from Koula to irrigate their sugar plantation in the arid area to the west, Makaweli.[3]

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[3] *Territory* v. *Gay*, 31 Hawaii 376, 377-8 (1930) describes the valleys and irrigation systems; Kauai has mountains with 400-500 inches of rainfall a year within 15 miles of coastal areas with less than 15 inches.

In 1929, the Territory of Hawaii brought suit to enjoin this diversion. The Court of Appeals affirmed the judgment of the Supreme Court of Hawaii denying the injunction and held that G&R had the right to take the normal surplus water to Makaweli. *Territory* v. *Gay*, 31 Hawaii 376 (1930), *aff'd*, 52 F.2d 356 (9th Cir. 1931), *cert. denied*, 284 U.S. 677 (1934).[4]

In this case, the Supreme Court of Hawaii failed to give effect to that judgment, and abolished the settled principles of Hawaii water law by holding that all water belongs to the State and that G&R may not take any water out of the watershed.

The taking by judicial decision of private property adjudicated by the Court of Appeals (52 F.2d 356, *cert. denied*, 284 U.S. 677 (1931), raised substantial federal questions. Whether the State may abolish its settled rules of property which have been relied on by the parties is also a substantial federal question. The decision and judgment in *Territory* v. *Gay* (*supra*) and prior judicial decisions refer to Hawaii's unique water law in the following terms:

Hawaii Water Law Terms

The main islands in the Hawaiian chain consist of valleys radiating from rainy central areas to the sea. The basic land unit was the *"ahupuaa,"* held by a chief directly from the King. It gave him a range of natural resources. It was divided into *"ili"* which he subinfeudated to lesser chieftains, who in turn subinfeudated

[4] The first case, *Territory* v. *Gay*, 26 Hawaii 382 (1922), held that G&R, not the Territory, owned Koula; *Territory* v. *Gay*, 32 Hawaii 404 (1932), was dismissed *forum non conveniens* and later affirmed.

to commoners. Their small holdings were *"kuleanas."* Some *ili* held directly from the king were *"ili kupono"* meaning independent *ili*. The chiefs required tenants to build irrigation dams and apportioned water which was essential to raise taro.[5] The chief of an *ahupuaa* or *ili* was called a *"konohiki."*

The concept of fee simple ownership was introduced in 1838-1856. The Board of Commissioners to Quiet Land Titles (the "Land Commission") in a report (Appendix B, *infra*, pp. 29-32) summarizes the ancient tenure as a tenancy in common in which king, chiefs and commoners had undivided interests. It recommended partition. The first step was the *Great Mahele* of 1848 in which each *konohiki* of an *ahupuaa* or *ili kupono* quitclaimed his interest in some of his lands to the king in exchange for a quitclaim from the king. This partition did not affect the commoners. The "Act of Aug. 6, 1850" (Appendix B, *infra* pp. 33-35)[6] authorized the Land Commission to award commoners lands. Their duties to the chiefs would cease, as would their rights in the chief's lands. King Kamehameha III insisted on the addition of Section 7, which provided that the grant of fee simple title to the chiefs would not terminate traditional rights of commoners. This is now Hawaii Revised Statutes § 7-1.

The statute did not define traditional water rights. This was done by the courts. Hutchins, *The Hawaiian*

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[5] The Hawaiian words for "law" (kanawai) and "property" (waiwai) are derived from the word for "water" (wai).

[6] The first four sections were passed on that date, Sections 5 and 6 were approved in principle by the 1850 Legislature, which adjourned recommending further study by the Privy Council, especially of Section 7.

System of Water Rights 239-244 [7] cites over 250 decisions of the Supreme Court of Hawaii on water rights. The basic terms of Hawaii water law are:

1. *Appurtenant rights.* A Land Commission award by the government carried with it the right to that quantity of water customarily used on the land at and immediately before the award, initially called "prescriptive." Later when it was decided that prescriptive rights could be acquired by adverse use, the term "appurtenant" was used. Appurtenant and prescriptive rights were easements.

2. *Surplus rights.* The *konohiki* owned all the water flowing from a source on his land except what was needed to meet the appurtenant and prescriptive rights of others.

3. *Transfer.* The owner of a water right was free to transfer water anywhere.

The Legislature in 1892 enacted what is now Hawaii Revised Statutes, § 1-1, adopting the common law "except as otherwise . . . fixed by Hawaiian judicial precedent, or established by Hawaiian usage." The Supreme Court of Hawaii found only one instance in Hawaii water law where precedent or usage did not exist. This was in *Carter* v. *Territory,* 24 Hawaii 47, 70 (1917). The court decided that in the very unusual situation of a stream running through two *ahupuaa,* all *"normal surplus"* belonged to the *konohiki* of the source, but that common law riparian doctrine applied to the *"storm and freshet"* surplus, which must

[7] This is a comprehensive treatment of Hawaii water law, published in 1946 by the U.S. Department of Agriculture in cooperation with the Board of Water Supply of the City and County of Honolulu.

be apportioned between the two *ahupuaa* in accordance with their needs.

Territory v. Gay

Territory v. Gay, 26 Hawaii 382 (1922) decided that Koula belonged to G&R because it was an *ili kupono.*

In *Territory* v. *Gay,* 31 Hawaii 376 (1930), 52 F.2d 356 (9th Cir. 1931), *cert. denied,* 284 U.S. 677 (1931), the Territory made *two claims*: 1) While Koula and Manuahi were *ili kupono,* they were of lesser dignity than an *ahupuaa,* which owned all the surplus water; or 2) If an *ili kupono* is of equal status, the rule of *Carter* v. *Territory* should be applied to require all surplus water to be apportioned and used without transfer out of the watershed.

The trial court decided: 1) that *ili kupono* were of equal status with *ahupuaa;* 2) that the normal surplus belongs to G&R without limitation as to place of use; and 3) that G&R was taking no *storm and freshet* surplus. The Territory appealed to the Supreme Court of Hawaii and then to the Ninth Circuit, urging both claims. Both courts affirmed. This Court denied certiorari.

Reliance

Thus G&R had a federal judgment that they owned the "normal surplus" and could take it to Makaweli. One part of the ditch, built in 1890-91, ran through wooden flumes which leaked and another across government land leased to G&R. This problem was solved by construction of a tunnel through G&R's land, connecting the old 1891 dams with Makaweli. Olokele Sugar Company, Limited (Olokele) leased some of G&R's sugar land in 1941. The lease guaranteed Olokele a share in the water. G&R and Olokele

expended over $900,000 on the tunnel which opened in 1949.

PRESENT PROCEEDINGS

In 1959, McBryde brought the present action, claiming appurtenant and prescriptive rights by adverse use and a share of the storm and freshet surplus. The State claimed appurtenant rights and a share in the storm and freshet surplus. Small owners claimed appurtenant rights. All parties agreed that G&R owned the normal surplus.[8] The pretrial order stipulated that Manuahi and Koula were *ili kupono* (Record Doc. No. 17, pp. 2, 3). All parties agreed that water could be transferred out of the watershed. The State claimed and was awarded appurtenant water rights of two parcels. (Amended Judgment, Record Doc. No. 34, Schedule B, Government Lots 6B and 54B). This was agreed to in the trial court and in the briefs and in argument on appeal.

THE DECISION CREATES FEDERAL ISSUES

The Supreme Court of Hawai decided that:

(a) The Land Commission *Principles* meant that all water belongs to the State (54 Hawaii 187; Joint Appendix 79);

(b) The "Act of Aug. 6, 1850" (Hawaii Revised Statutes § 7-1) adopted Massachusetts riparian law, under which each riparian owner has the right to have the stream left in "its natural size and condition" (54 Hawaii 192-198; Joint Appendix 84-90);

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[8] *E.g.* Opening Brief of the State of Hawaii (Record Doc. No. 18, p. 18): "As held by our Supreme Court, Gay and Robinson as owner of the *ili* of Koula is entitled to the normal daily surplus in Hanapepe River." See also McBryde's Plaintiffs' Opening Brief (Record Doc. No. 19, pp. 1-2).

(c) There is no "normal daily surplus water" and *Territory* v. *Gay,* while *res judicata* between the State and G&R, decided that G&R owned property rights which did not exist (54 Hawaii 199, Joint Appendix 91);

(d) Appurtenant rights are characterized as "quaint" and the legislature is invited to examine the question (54 Hawaii 189, footnote 15; Joint Appendix 81);

(e) Koula is not an *ili kupono* (54 Hawaii 183; Joint Appendix 75).

The dissent pointed out that none of these issues had been tried below or raised on appeal (54 Hawaii 201, 202; Joint Appendix 93, 94).

G&R moved for a rehearing. A copy of its petition is Appendix A to this petition. The federal issues were raised in paragraphs 3 and 4. Rehearing was granted, but confined to two non-federal questions (Joint Appendix 108). No briefing or argument[9] on constitutional questions was allowed. Upon rehearing, the court adhered to its original opinion.

REASONS FOR GRANTING THE WRIT

Petitioners present three federal questions:

1. The nullification of the judgment of the United States Court of Appeals;

2. The overruling of a century of settled Hawaii water law upon which petitioners had relied; and

3. The failure to give petitioners any opportunity to be heard or present evidence on the grave constitutional issues raised by the court *sua sponte.*

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[9] Our motion to have a record made of oral argument was denied (Joint Appendix 111, 113)

I

THE DECISION BELOW NULLIFIED THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS

Territory v. *Gay,* 31 Hawaii 376 (1930), *aff'd,* 52 F.2d 356 (9th Cir. 1931), *cert. denied,* 284 U.S. 677 (1931) was described as follows:

> This action was brought by the territory of Hawaii to enjoin the further diversion of the Koula stream and the Manuahi stream, tributaries of the Hanapepe river . . . These waters have been diverted for about forty years (since 1891) for the purpose of irrigating a sugar plantation belonging to the Hawaiian Sugar Company, Limited, a lessee of appellees Gay & Robinson. (52 F.2d 356)

The Territory made two claims to justify the injunction: a) that it owned all the surplus; or b) if G&R owned a share in the water, it could not take it out of the watershed (52 F.2d 357). The court rejected both claims, as had the lower courts.

The decision of the Supreme Court of Hawaii in the instant case ignores the fact that in *Territory* v. *Gay* (*supra*) the right to transport that water was the basic issue and decided. Justice Marumoto, dissenting, held the:

> decision effectively nullifies that holding to the extent that it denies G&R the right to divert the normal surplus water of Koula stream and Manuahi stream to Makaweli. (54 Hawaii 206; Joint Appendix 98)

The majority opinions treat *Territory* v. *Gay* as if no federal court had ever decided the case. They even omit the federal citation (52 F.2d 357 (1931), *cert. denied,* 284 U.S. 677 (1931)).

The Ninth Circuit had jurisdiction to review the judgments of the territorial supreme court on all questions, local territorial and federal law. Normally, it deferred to the opinion of the territorial courts on local questions; however, it had the "power to reverse any ruling of the territorial court on law or fact" *Waialua Agricultural Co.* v. *Christian,* 305 U.S. 91, 108-109 (1938).

Furthermore, because during territorial status, title to all "territorial" property was in the United States, questions as to the Territory's property rights were federal questions. *United States* v. *Fullard-Leo,* 331 U.S. 256, 269-270 (1947). The statutory bases of the jurisdiction were cited by that court (52 F.2d 356-7).

The Supreme Court of Hawaii was bound to respect the judgment of the Ninth Circuit. This question has been considered by this Court in the following cases:

Embry v. *Palmer,*
107 U.S. 3, 9 (1882);

Crescent Livestock Co. v. *Butchers' Union,*
120 U.S. 141 (1887);

Hancock National Bank v. *Farnum,*
176 U.S. 640 (1900);

Deposit Bank v. *Frankfort,*
191 U.S. 499, 508, 515, 519 (1903);

Dupasseur v. *Rochereau,*
21 Wall. 130 (1875);

Riverdale Mills v. *Manufacturing Co.,*
198 U.S. 188 (1905);

Dowell v. *Applegate,*
152 U.S. 327 (1894);

Louisville RR Co. v. *Stockyards Co.*,
212 U.S. 132, 143 (1909);

Stoll v. *Gottlieb*,
305 U.S. 165 (1938).

A federal judgment must be respected by the state courts, even though it followed a subsequently overruled state decision. *Deposit Bank* v. *Frankfort*, 191 U.S. 499 (1903).

The fact that the Ninth Circuit no longer has appellate jurisdiction over the Hawaii courts makes no difference. In *Hughes* v. *Washington*, 389 U.S. 290 (1967), the United States lost jurisdiction to convey tidelands when Washington became a state, but statehood did not give the state the power to deprive Mrs. Hughes of her right of accretion given her by the United States. That right remains one of federal law. *Hughes* cannot be distinguished on the theory that a patent "creates" title, but a judgment "adjudicates" it. Even among non-parties, it has the same effect as a deed between the parties. *Barr* v. *Gratz's Executors*, 4 Wheat. 213, 220 (1819) (giving that effect to a federal judgment). Restatement, *Judgments* § 110.

Nor does statehood diminish the importance of the question. Most states were formerly territories. The fact that it is no longer possible to appeal to the Ninth Circuit to protect its judgment makes it all the more important for this Court to do so.

II

THE DECISION BELOW, BY OVERRULING SETTLED STATE LAW, DEPRIVED PETITIONERS OF PROPERTY WITHOUT DUE PROCESS OF LAW OR JUST COMPENSATION

Property law is the creature of the state, but once created its owners are protected by the Fourteenth Amendment. *Perry* v. *Sindermann,* 408 U.S. 593 (1972). If the Hawaii legislature had countered *Territory* v. *Gay,* with "Be it enacted: The normal surplus water of Koula and Manuahi belongs to the State of Hawaii," there is no question but that it would have been an unconstitutional deprivation of property.

The decision of the Supreme Court of Hawaii is as much state action as that of the legislature.

> *Brinkerhoff-Faris Co.* v. *Hill,*
> 281 U.S. 673 (1930)
>
> "The federal guaranty of due process extends to state action through its judical as well as its legislative, executive or administrative branch of government."
>
> *Shelley* v. *Kraemer,*
> 334 U.S. 1, 15 (1948)

Latitude is allowed for the judicial process of the common law, but there are limits to the extent to which it can overrule a rule of law to the detriment of a person who relied on it.

See:

> *Muhlker* v. *Harlem Railroad Co.,*
> 197 U.S. 544 (1905);
>
> *Sauer* v. *New York,*
> 206 U.S. 536 (1907);

Chicago & Alton RR v. *Tranbarger,*
238 U.S. 67 (1915);

O'Neil v. *North'n Colorado Irrigation Co.,*
242 U.S. 20 (1916);

Brinkerhoff-Faris Co. v. *Hill,*
281 U.S. 673 (1930);

NAACP v. *Alabama,*
357 U.S. 449 (1958);

Cf.:

Bouie v. *City of Columbia,*
378 U.S. 347 (1964);

Hughes v. *Washington,*
389 U.S. 290, 296 (1967)
(Stewart, J., concurring)

Included above are cases in which this Court decided that constitutional limits were not transgressed. We are *not* claiming that the Fourteenth Amendment makes *stare decisis* a constitutional imperative. There are clear distinctions:

1. The new decision must be precisely contrary to the earlier law. Reasonable distinctions are constitutional, *Sauer* v. *New York,* 206 U.S. 536 (1907). It is only when this Court is "unable to reconcile the procedural holding . . . with [the state court's] past unambiguous holdings" *NAACP* v. *Alabama,* 357 U.S. 449, 456 (1958), or this Court finds "The state Supreme Court . . . announcing a rule . . . inconsistent with or opposed to its former decisions," *St. Anthony Water Power Co.* v. *Water Commissioners,* 168 U.S. 349, 371 (1897), that there is any unconstitutionality. In contrast, *stare decisis* is based upon the broad policy concepts of earlier decisions.

In the present case, the Supreme Court of Hawaii decided that the same property awarded G&R in *Territory* v. *Gay* now belongs to the State. The majority opinion below is explicit that it is "self-correction" and that earlier decisions "are overruled" (54 Hawaii 180; Joint Appendix 72 [10]). There is no need to repeat in this petition the demonstration of the two dissenting opinions that this involved the overruling of the long-settled basic principles of Hawaii water law.

2. *Stare decisis* is often applied on the presumption that somebody, not necessarily the party before the court, had relied. The party claming it must show actual reliance on the earlier decision. There is no unconstitutionality if there has been "no different construction . . . that might have lulled him to repose." *O'Neil* v. *North'n Colorado Irrigation Co.,* 242 U.S. 20, 26 (1916). *Brinkerhoff-Faris Co.* v. *Hill,* 281 U.S. 673, 682, n. 9 (1930). The full extent of G&R's reliance is not shown in the record because it was not in issue at trial, but some evidence of it came in on collateral issues, *e.g.,* G&R's 1941 lease to Olokele (Finding 21, Joint Appendix 10-11).

3. There must be a deprivation of life, liberty or property. A railroad held liable for flood waters which back up because it failed to put a culvert in its embankment is not deprived of property when the record shows it ran on trestles for many years. *Chicago & Alton RR* v. *Tranbarger,* 238 U.S. 67 (1915).

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[10] The Hawaii court characterized some of the precedents behind *Territory* v. *Gay* as dictum, apparently because the Territory was not a party. *In re Taxes, Waiahole Water Co., Ltd.,* 21 Hawaii 679 (1913), had upheld the property tax assessment of the surplus water right the taxpayer leased for use elsewhere. The Hawaii Supreme Court upheld the Territory's contention that the mere right to surplus water was property and taxable. The Territory was also a party to *Carter* v. *Territory* and *Territory* v. *Gay* itself.

Under Hawaii law, water rights were property. *Kaneohe Ranch Co.* v. *Ah On,* 11 Hawaii 275 (1898), and *Brown* v. *Koloa Sugar Co.,* 12 Hawaii 409, 412 (1900), held they are real property. They were easements. *Appeal of A. S. Cleghorn,* 3 Hawaii 216, 218 (1870).

This Court has not been presented with many cases in which a state has overruled a whole body of law which has obviously been relied on. Nevertheless, though it seldom arises, it remains a "serious constitutional question." *Bonnelli Cattle Company* v. *Arizona,*——U.S.——, 94 S.Ct. 517, 528 (1973).

III

PETITIONERS WERE DEPRIVED OF PROPERTY WHEN ISSUES WERE DECIDED WITHOUT NOTICE OR OPPORTUNITY TO BE HEARD

The decision below teems with decisions of fact on which G&R had no notice that they were in issue. The simplest example is at 54 Hawaii 183; Joint Appendix 75:

> Further, the finding that the ili of Koula was an *ili kupono* is not substantiated by the record.

This was admitted by all parties below. The pretrial order provided:

> The ownership of land set forth in Exhibit 1 is admitted, and it is further admitted that the partners of Gay & Robinson . . . are the owners of the ilis kupono of Koula and Manuahi . . . . (R. Doc. No. 17, pp. 2-3)

That Koula was an *ili kupono* had been decided in *Territory* v. *Gay,* 26 Hawaii 382 (1922). All parties admitted the fact at pretrial. No question was ever raised. It was a deprivation of property without due

process for the Supreme Court of Hawaii to find otherwise.

The leading case is *Saunders* v. *Shaw,* 244 U.S. 317 (1917). At trial in state court, plaintiff had offered evidence that a drainage district's work had not benefitted his land. The trial judge excluded this evidence on the basis that the statute creating the district was conclusive, but permitted an offer of proof. The defendant offered no evidence to prove plaintiff's land was benefitted. The state supreme court affirmed. Then on rehearing, it considered a recent decision of this Court, and reversed out of hand, accepting the offer of proof as true. Defendant moved for rehearing, pointing out that he had had no notice that he needed to rebut the offer of proof. This was denied. This Court reversed the judgment of the state court.

IV

THE FEDERAL ISSUES WERE TIMELY RAISED

This Court requires that federal questions be presented to the state courts at the earliest stage that state law requires, usually at trial. However, when the federal issue is created for the first time by a state supreme court on appeal, the federal question may be raised on rehearing.

Saunders v. *Shaw,* 244 U.S. 317, 320 (1917)

Through trial and appeal, defendant was always told he did not have to prove plaintiff's land was benefitted. On rehearing, plaintiff's offer of proof was not only held admissible, but accepted as true. Defendant petitioned for a second rehearing, raising for the first time his federal due process claim to a chance to prove

the opposite, and was told that the state court's rules permitted no second rehearings. Nevertheless, this Court heard and decided the case because defendant had raised his federal claim at the earliest stage in the proceedings that it should have realized it was in jeopardy.

Brinkerhoff-Faris Co. v. *Hill,* 281 U.S. 673 (1930) is even more closely in point. Plaintiff sought review of his taxes in state court. The state supreme court held that he should have sought review from the state tax commission in spite of its earlier decision that such a course was "preposterous" and "unthinkable."

> The possibility of relief before the tax commission was not suggested by anyone in the entire litigation until the supreme court filed its opinion. . . . . (281 U.S. 677)

Plaintiff sought rehearing, invoking the Fourteenth Amendment for the first time. (281 U.S. 677-8)

The additional federal claim thus made was timely since it was raised at the first opportunity. (281 U.S. 678)

See also:

NAACP v. *Alabama,*
357 U.S. 449 (1958);

Ohio ex rel. Bryant v. *Akron Metropolitan Park District,*
281 U.S. 74 (1930);

Missouri ex rel Missouri Insurance Co. v. *Gehner,*
281 U.S. 313 (1930);

Cole v. *Arkansas,*
333 U.S. 196 (1948);

Great Northern Ry. Co. v. *Sunburst Co.*,
287 U.S. 358, 366 (1932)

The dissenting opinion of Mr. Justice Levinson points out that we could not be expected to anticipate the decision below and the federal issues it would create.

> . . . *McBryde I* is a totally unforseeable departture from prior cases of this court on the subject of water rights . . . . (55 Hawaii 302; Joint Appendix 156)
>
> Integral to the trial court's judgment were two principles of Hawaiian water law, which it considered to be solidly bottomed in Hawaiian judicial precedent and which were unquestioned by any of the parties. (55 Hawaii 265; Joint Appendix 119).
>
> In view of the wholly unexpected nature of the court's holdings in *McBryde I,* the parties of course could not have been expected to raise their constitutional claims as part of their appeals from the decision of the trial court. Since the parties asserted constitutional grounds for the reversal of McBryde I at the first possible instance—in their petitions for rehearing . . . (55 Hawaii 297; Joint Appendix 151)

As was pointed out by the earlier dissenting opinion of Mr. Justice Marumoto:

> That decision has no relation whatsoever to the judgment appealed from in this case, and is neither within the issues raised and tried in the circuit court nor within the questions presented and argued to this court. (54 Hawaii 201; Joint Appendix 93).

It is clear from Mr. Justice Levinson's dissent that the constitutional questions and federal question were squarely presented to the Supreme Court of Hawaii which we now petition this Court to review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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